Supreme Court, U.S.
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89-1005

No.

IN THE

Supreme Court of the United States

October Term, 1989

PHIL CARUSO, as President of the Patrolmen's Benevolent Association of the City of New York, Inc., and THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioners,

against

THE CITY OF NEW YORK, EDWARD I. KOCH, as Mayor of the City of New York, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, BENJAMIN WARD, as Police Commissioner of the City of New York, and THE CIVILIAN COMPLAINT REVIEW BOARD of the Police Department of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI

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(8466)

Question Presented for Review

Whether Respondents violated Petitioners' due process rights under the Fifth and Fourteenth Amendments to the United States Constitution by diminishing their property right in their Civil Service employment, when Respondents promulgated an amendment to the New York City Charter which changed a previously enacted City Charter provision which had gone into effect by referendum, and where the subject matter contained in the amendment had been specifically rejected by the voting electorate in the referendum.

List of Interested Parties

Counsel of record for Phil Caruso and the Patrolmen's Benevolent Association of the City of New York, Inc. certifies that the following parties have an interest in the outcome of this case.

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   New York, NY 10007

2. Solicitor General
   Department of Justice
   Washington, D.C. 20530

3. Attorney General
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

PHIL CARUSO, as President of the Patrolmen's Benevolent Association of the City of New York, Inc., and THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioners,

against

THE CITY OF NEW YORK, EDWARD I. KOCH, as Mayor of the City of New York, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, BENJAMIN WARD, as Police Commissioner of the City of New York, and THE CIVILIAN COMPLAINT REVIEW BOARD of the Police Department of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK.

Petition for a Writ of Certiorari

Petitioners Phil Caruso, as President of the Patrolmen's Benevolent Association of the City of New York, Inc., and The Patrolmen's Benevolent Association of the City of New York, Inc., pray for a Writ of Certiorari to review an Order of the Court of Appeals of the State of New York, entered in these proceedings on or about October 12, 1989, which affirmed an Order of the Supreme Court, Appellate Division, First Department, dated October 20, 1988, which affirmed a Judgment of the Supreme Court of the State of New York, New York County, entered July 29, 1987, which denied a Petition brought pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York (application in mandamus, prohibition and certiorari) to review and annul a certain legislative amendment of the New York City Charter as being violative of Petitioners' due process and property rights under the Fifth and Fourteenth Amendments of the United States Constitution.

Opinions Below

The Order of the Court of Appeals of the State of New York, affirming the Order of the Supreme Court of the State of New York, Appellate Division, First Department, appears at page 24 of the attached Appendix. The decision has not as yet been officially reported.

The Order of the Supreme Court of the State of New York, Appellate Division, First Department, affirming the Judgment of the Supreme Court, New York County appears at page 25 to page 26 of the attached Appendix. The decision has been officially reported at 143 A.D.2d 601 (1st Dept. 1988).

The Judgment and written Decision of the Supreme Court of the State of New York, New York County,

which denied the proceeding brought pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York appears at page 27 to page 35 of the attached Appendix. The decision has been officially reported at 136 Misc.2d 892 (Sup.Ct. N.Y. Co. 1987).

Jurisdiction

The final order of the Court of Appeals of the State of New York in this matter was entered on October 12, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). This Court has jurisdiction of the controversy because it involves a ". . . title, right privilege or immunity . . . specially set up or claimed under the Constitution, treaties, statutes of, or commission held or authority exercised under the United States." 28 U.S.C. Section 1257(3).

Statutory Provisions Involved

Section 440 of the New York City Charter, prior to the statutory amendment in question, reads as follows:

> §440. **Civilian complaints against members of the police department.** (a) Policy. It is hereby declared to be the public policy of the city of New York in order to preserve the independence and integrity of police service, that civilian complaints against members of the police department of the city of New York shall be investigated and dealt with fully and fairly by the appropriate officials regularly charged with the governance and discipline of the police department without interference by any person or group of persons not regularly in police service.

(b) Definitions. As used in this section:

1. The term "mayor" means the mayor of the city of New York or any official acting on his behalf or in his place and stead.

2. The term "commissioner" means the police commissioner of the city of New York or any official acting on his behalf or in his place and stead.

c. The term "police department" means the police department of the city of New York.

4. The term "civilian" means any person who is not a member or full-time employee of the police department.

(c) Review of civilian complaints. The commissioner shall have the power to and may establish within the police department a review board, to consist of one or more persons, who shall serve at his pleasure, which board may have the power to receive, to investigate, to hear and to recommend action upon civilian complaints against members of the police department, or any one or more of such powers, provided that each member of such board is, and for a period of at least one year prior to his appointment to such board has been, a regularly appointed, full-time member or full-time administrative employee of the police department and shall continue to be a full-time member or full-time administrative employee of the police department during his period of service on such board. Neither the mayor, the commissioner, nor any other administrator or officer of the city of New York shall have power to authorize any person,

agency, board or group to receive, to investigate, to hear, or to require or recommend action upon, civilian complaints against members of the police department except as provided in this section.

(d) Attendance by police officers. No member of the police department or other person shall be disciplined or otherwise penalized for his failure to appear before or respond to the inquiries of any person, agency, board or group appointed by the mayor, the commissioner, or any other administrator or officer of the city of New York to receive, to investigate, to hear or to require or recommend action upon civilian complaints against members of the police department, unless such person, agency, board or group shall be duly appointed in accordance with the provisions of this section.

(e) Prosecution: right to hearing. Notwithstanding anything herein contained to the contrary, this section shall not be construed to prevent investigation or prosecution of members of the police department for violations of law by a duly constituted court having jurisdiction, a grand jury, district attorney or other law enforcement agency; nor shall this section be construed to permit a member of the police department to be fined, reprimanded, removed, suspended or dismissed, except upon written charges, after such charges have been examined, heard and investigated by the commissioner, one of his deputies or the assistant to the commissioner.

(f) Separability. The invalidity of any provision or provisions of this section shall not affect the validity of the remaining provisions thereof, but such

remaining provisions shall continue in full force and effect.

Section 440 of the New York City Charter, as amended, reads as follows:

A LOCAL LAW

To amend the New York City Charter, in relation to civilian review of police actions.

Be it enacted by the Council as follows:

Section 1. Subdivisions a and c of section four hundred forty of chapter eighteen of the New York city charter, as added by vote of the electors on November eighth, nineteen hundred sixty-six, are amended to read as follows:

(a) Policy. It is hereby declared to be the public policy of the city of New York in order to preserve the independence and integrity of police service, that civilian complaints against members of the police department of the city of New York shall be *reviewed fairly and impartially by the review board established in this section and shall be* investigated and dealt with fully and fairly by the appropriate officials regularly charged with the governance and discipline of the police department without interference by any person or group of persons not regularly in police service.

(c) Review of civilian complaints. [The commissioner shall have the power to and may establish]

Note: Matter in *italics* is new; matter in brackets[ ] to be omitted.

There shall continue to be within the police department a review board, [to consist of one or more persons, who shall serve at his pleasure which board may have] *with* the power to receive, to investigate, to hear and to recommend action upon civilian complaints against members of the police department[, or any one or more of such powers, provided that each member of such board is, and]. *The board shall consist of twelve members, of whom six shall be members of the public selected so that one resident from each of the five boroughs of the city and one citywide representative are members. The public representatives shall be appointed by the mayor for terms of two years with advice and consent of the council in the same manner as is provided in section forty-six of this charter. Six members shall be appointed by the commissioner for terms of two years. Each member appointed by the commissioner must have been,* for a period of at least one year prior to his appointment to such board [has been], a regularly appointed, full-time member or full-time administrative employee of the police department [and shall continue to be a full-time member of full-time administrative employee of the police department during his period of service on such board]. *Any such member shall be a member of the board only for such time as he or she is so employed. In the event of a vacancy on the board during the term of office or a member by reason of removal, death, resignation, or otherwise, a successor shall be chosen in the same manner as was the member whose position became vacant. A member appointed to fill a vacancy shall serve for the balance*

Note: Matter in *italics* is new; matter in brackets[ ] to be omitted.

of the unexpired term. Neither the mayor, the commissioner, nor any other administrator or officer of the city of New York shall have power to authorize any person, agency, board or group to receive, to investigate, to hear, or to require or recommend action upon[,] civilian complaints against members of the police department except as provided in this section, *provided that nothing herein shall limit or impair the authority of the commissioner to discipline members of the force pursuant to law.*

§2. Subdivision d, e and f of section four hundred forty of such charter are relettered to be subdivisions e, f and g and such section is amended by adding a new subdivision, to be subdivision d, as follows:

d. Rules of procedure; staffing. 1. The board shall establish rules of procedure, which may provide for the establishment of panels of the board of not less than three members each, which shall consist of at least one public representative to act on behalf of the board. No panel shall consist entirely of public representatives. Such panels may recommend action on civilian complaints against members of the police department.

2. The commissioner shall assign personnel of the police department to assist the board and conduct investigations on its behalf.

§3. Notwithstanding any provision of this local law to the contrary, any ongoing review of a civil-

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Note: Matter in *italics* is new; matter in brackets[ ] to be omitted.

ian complaint received prior to the effective date of this local law may continue to be considered by the board as constituted prior to such effective date.

§4. This local law shall take effect ninety days after it shall have become a law.

Statement of the Case

A. The Formation of the Civilian Complaint Review Board and the Referendum

In 1966, Respondent Civilian Complaint Review Board was formed with the passage of Section 440 of the New York City Charter. Petitioners, as the duly recognized bargaining agent for the New York City Police Officers, were concerned from the outset of the formation of the review board that the rights of its membership be ensured, and free from being compromised by any irresponsible actions motivated by short-term political considerations.

Originally, the Police Commissioner established an advisory review board by administrative order in May, 1966 consisting of four members appointed by the Mayor and three members appointed by the Police Commissioner to review facts obtained by an investigating unit relating to civilian complaints against police officers and to make recommendations as to whether formal charges should be preferred on the basis thereof.

On July 7, 1966, pursuant to Municipal Home Rule Law Section 37, petitions were filed with the City Clerk

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Note: Matter in *italics* is new; matter in brackets[ ] to be omitted.

of the City of New York for submission of a proposed local law to the voting public of the City of New York at the general election of November, 1966. The petitions were submitted on behalf of the Petitioner Association in order to protect the membership of the Association by limiting the composition of the review board to members of the Police Department and that the addition of non-Police Department personnel, that is, civilians, would be prohibited.

The City Clerk declined to accept the petitions, and Article 78 proceedings by the proponents of the petitions brought pursuant to Municipal Home Rule Section 37 were duly instituted.

The Supreme Court, at Special Term, granted the Petitioners the relief requested. The City appealed to the Appellate Division, which affirmed by a divided Court (see *Cassese v. Katz,* 26 A.D.2d 248 [1st Dept. 1966]), and further affirmed by the Court of Appeals (see 18 N.Y.2d 694 [1966]).

In the following November, in 1966, at the general election, the voters of the City of New York voted overwhelmingly in favor of the proposition advanced by the proponents of the petitions. The passage of the proposition was by a three-to-one margin. By this City-wide referendum, the concept of a civilian controlled Civilian Complaint Review Board was clearly rejected by the electorate.

From 1966 until the enactment of the City Council, at issue here, the make-up of the Civilian Complaint Review Board has been limited to employees of the New York City Police Department.

B. The City Council Amends the City Charter by Local Law Instead of Referendum

During the later months of 1986, an amendment to Section 440 of the New York City Charter was proposed to change the composition of the Civilian Complaint Review Board, from all full-time employees of the Police Department to a 12-member Board, six of which members would be selected from the public at large by the Mayor with the advice and consent of the City Council. Petitioners actively lobbied against the proposed amendment.

On November 6, 1986, the City Council passed a local law, No. 13-A to amend Section 440 of the City Charter. On November 24, 1986, the Mayor of the City of New York signed the bill into law. This was done despite the active opposition of Petitioners to the amendment process.

C. Petitioners Commence the Present Proceeding

By Article 78 Petition, verified on December 7, 1986, Petitioners instituted the instant special proceeding and requested the Court below to declare the legislative enactment by the City Council to amend Section 440 of the City Charter to be a nullity, and to reinstate the Section in the form that it existed prior to the amendment.

In the Petition, the prior history of the enactment was set forth and Petitioners set forth their position that, while the State of New York clearly does not prefer to have its lawmaking done by public vote, once a law is passed by referendum, it is entitled to be treated with the prerequisite due a law passed by the electorate, and therefore, where a subject of legislation has been expressly repudiated by the electorate, a legislative body cannot, at a subsequent time, enact that subject matter.

Respondents opposed the Petition by filing a Cross-Motion to Dismiss the Petition on or about January 8, 1987. The case was assigned to the Honorable Arthur E. Blyn, Justice of the Supreme Court, for decision. During the argument, Justice Blyn directed the Respondents to file a Verified Answer to the Petition. Respondents complied with this direction by the filing of a Verified Answer on or about January 21, 1987, and the matter was deemed submitted to the Court on that date.

D. The Decision of Supreme Court

In a written Memorandum Decision, dated July 9, 1987, Supreme Court, New York County, dismissed the Petition. Justice Blyn noted that there was no express provision in the broad "home rule" powers granted municipalities in this State on the question of whether a municipal legislature may amend or repeal a local law enacted by voter initiative.

After noting the scarcity of case law on point, and the circumstance that in examining the law of other jurisdictions within the United States, there appeared to be a split on the question of whether there existed an implicit restraint on legislative amendment or repeal of laws initiated by voter referendum, the Supreme Court chose to follow the view that laws proposed and enacted by the voting electorate under a referendum could be modified or abolished by a legislative body.

The Supreme Court also suggested that, given that 20 years have elapsed between the enactment of the voters and the amendment by the City Council, it could be considered that the "*vox populi,* which secured the initiated legislation, changed its own voice."

The Supreme Court, therefore, granted Respondents' Cross-Motion to Dismiss the Petition. Justice Blyn's decision is reported at 136 Misc.2d 892. Petitioners then appealed to the Appellate Division.

E. The Proceedings in the Appellate Division

Petitioners duly perfected an appeal in the Supreme Court, Appellate Division, First Department. By Order dated October 20, 1988, the Appellate Division affirmed the decision of the Supreme Court, New York County, on the written opinion by that Court.

F. The Proceedings in the New York Court of Appeals

Petitioners made a timely Motion for Leave to appeal to the Court of Appeals of the State of New York by Notice of Motion, dated December 15, 1988. In due course, that Court granted said Motion by Order entered March 23, 1989.

After hearing argument, the New York Court of Appeals, by Order dated October 12, 1989, affirmed the Order appealed from for the reasons stated in the opinion of Supreme Court, New York County.

Petitioners now move this Court for a Writ of Certiorari to further review this controversy.

Reasons for Granting Writ of Certiorari

Respondents violated petitioners' due process rights under the Fifth and Fourteenth Amendments to the United States Constitution by diminishing their property right in their civil service employment, when Respondents promulgated an amendment to the New York City Charter which changed a previously enacted City Charter provision which had gone into effect by referendum, and where the subject matter contained in the amendment had been specifically rejected by the voting electorate in the referendum.

On this proceeding, it is Petitioners' position that Respondents have violated their due process rights under the Fifth and Fourteenth Amendments to the United States Constitution when Respondents promulgated an amendment to the New York City Charter which changed a previously enacted City Charter provision which had gone into effect by the referendum process.

Given that the subject matter contained in the amendment had been specifically rejected by the voting electorate in the referendum, Respondents have acted to circumvent the popularly enacted statutory provision by resorting to a legislative process which they control.

Petitioners' membership was harmed by this act by Respondents. Petitioner sought their redress in the courts of the State of New York but were wrongfully turned away. Therefore, Petitioners are compelled to seek satisfaction in this Court because of the fact that Respondents' action in subverting the enactment process trampled upon Petitioners' due process rights to a specific property interest.

Specifically, the statute, Section 440 of the New York City Charter, guaranteed to the membership of the Petitioner Association certain rights and protections to be free from abusive treatment by a certain arm of the New York City Police Department, namely the Civil Complaint Review Board. This subdivision had originally been created for Respondents' purely political ends and at the expense of due rights by Petitioners' membership.

Under the circumstances present, the amendment to the statute served to remove the rights and protections to be free from abusive administrative treatment and made Petitioners' membership more vulnerable to such abusive treatment. This taking away of rights has a definite and negative impact upon the proprietary interests of Petitioners' membership to the extent of amounting to an unconstitutional taking of property rights. *Bishop v. Wood,* 426 U.S. 341 (1976).

To better illustrate this point, a certain amount of background needs to be recounted. It must be stated at the outset that the question of whether statutes which had been passed by referendum in the manner done here can be amended by legislation passed by a legislative body, has been only sparingly addressed by the Courts of the State of New York if at all. Compare *Halfmoon Bridge Company v. Canal Board, et al.,* 91 Misc. 600 (Sup.Ct. Saratoga Co., 1915).

The amendment section of the New York City Charter is set forth in Section 42 and reads as follows:

> Section 42. *Amendment of charter.* Amendments to this charter may be adopted by any of the following methods;

1. By local law adopted in accordance with the provisions of this charter.

2. By vote of the electors of the city upon the petition of electors of the city, an amendment may be adopted

(a) in relation to the manner of voting for the elective officers of the city or any of them, or

(b) abolishing any elective office or offices or creating a new office or offices, including if so provided a transfer of powers to the newly created office or offices or a disposition of the powers of any office abolished, but no such amendment shall repeat or change any limitations contained in this charter on any power.

(c) such amendment may be adopted in the manner following

(1) Not less that fifty thousand qualified electors of the city may file in the office of the city clerk a petition for the submission to the electors of the city at the next general election therein held not less that sixty days after filing of such petition of such a proposed amendment or amendments to the charter to be set forth in full in the petition. . .

(2) If such proposed amendment or amendments receive the affirmative vote of the majority of the qualified electors of the city voting thereon, it or they shall take effect as prescribed therein.

(3) In such other manner as may be provided by law.

As recounted in the Factual Background, *supra,* the Civilian Complaint Review Board was formed in 1966 with the passage of Section 440 of the New York City Charter. Petitioners and members of the public who were concerned with the rights of Petitioners' membership caused the enactment of the section to be done by referendum in order to be assured that only full time members of the New York City Police Department would serve as members of the Review Board.

At the time, the concern was to prevent political considerations from influencing the outcome of administrative proceedings involving police officers charged with civilian complaints, and to thereby, preserve the independence and integrity of the police service.

The section of the New York City Charter at issue, from the discussion of the facts, above, came into existence, not as an initiative on the part of the city government, but directly from the people, themselves. Proponents made the suggestion that if there be a Civilian Complaint Review Board, it is formed for the express purpose of preserving the "independence and integrity of police service" and that all members of the Board be members of the Police Department. Non-members of the Police Department were to be excluded from membership on the Board.

The city government was not pleased with the proposal. Steps were taken to prevent the people from voting on the measure. The City Clerk refused to permit the proposal to be placed on the ballot. The proponents of the proposal were compelled to seek redress in the Court system. The Courts upheld the rights of the proponents of the proposal to present it as a referendum. (See *Cassese v. Katz,* 26 A.D.2d 248 [1st Dept. 1966], *aff'd* 18 N.Y.2d 694 [1966], *supra.*)

The voters overwhelmingly adopted the proposal at the November, 1966 general election. The concept of civilians, that is non-Police Department personnel, as members of the Civilian Complaint Review Board was clearly rejected.

The amendment process was appropriate and performed in a manner consistent with the amendment provision of the City Charter. Compare *Astwood v. Cohen,* 291 N.Y. 484 (1944).

The people of the City of New York, in passing the referendum, definitively spoke on the subject. Even in the State of New York, where the practice of referenda is not a favored means by which laws are passed, it has been held that if an enactment, which had previously been the subject of a referendum, can be changed or nullified at will by a legislative body, its approval by referendum on the part of the voting electorate would seem to have been without reason or necessity. *Halfmoon Bridge Company v. Canal Board, et al., supra.*

Petitioners submit that in the present case, the action of the City Council in amending Section 440 of the City Charter should have been set aside by the Court of the State of New York. Failure to do so necessarily means that the action of the people in enacting the legislation by referendum would be a futile gesture, and quite meaningless.

It is conceded by Petitioners that the New York City Charter, in its amendment provision at Section 42, speaks to the amendment process by permitting alternate means of amendment. According to the section, the City Charter may be amended by either the regular process of legislation, or by referendum vote of the people. Petitioners also

agree that the amendment statute is silent as to whether a section of the City Charter which has come into existence by the amendment process, subsequently can only be repealed or modified by referendum. The political process should not have been permitted to undercut the clearly stated mandate by the people.

The Supreme Court of the State of New York, New York County appeared to speak about supposed changes of condition, changes of circumstances, changes in the nature of the electorate. Such a discussion was, Petitioners respectfully submit, entirely speculative. What occurred here was that the politicians of the City of New York decided on a course of action and acted accordingly. Petitioners submit that had these politicians actually believed that circumstances today were so different from 1966, they should have put the question of civilian members being placed on the Civilian Complaint Review Board on the ballot at the next general election, rather than have utilized the legislative process.

Petitioners take this position, because they are concerned about the danger of abuse by legislative bodies of the stated will of the people, in situations where the legislative bodies may believe the stated will of the people is wrong. Petitioners submit that such an attitude by legislative bodies smacks of unnecessary elitism and of hegemonistic tendencies. Petitioners further submit that it should be the people who give directives to their elected legislative officials, and not the other way around.

Dictum in a case which Petitioners find persuasive can best illustrate Petitioners' viewpoint. In the case, decided by the Supreme Judicial Court of the State of Maine, *Bird v. Town of Orchard Beach,* 426 A.2d 370 (1981), the following is found:

> We do recognize that, if empowered to re-enact ordinances, orders or resolutions following their rejection by the voters in referendum elections, a municipal council could abuse the power by adopting a repetitive pattern of re-legislation to be followed by voter's referendums and elections.

Although *Bird,* itself, was a case in which the Court ultimately held against the position taken here by Petitioners, it is submitted that this dictum is of significance and is a fair recognition that a municipal council was readily capable of abusing and frustrating the will of the electorate by re-legislation. Before the Courts of the State of New York, Petitioners cited the teaching of the Court in *Bird* rather than relying upon its result. It is this teaching which Petitioners ask this Court to recognize and adopt.

Further, in support of Petitioners' position, the attention of the Court is respectfully referred to several cases in other jurisdictions which might be on point. In a neighboring jurisdiction, albeit in a somewhat different context, the principle has been stated that "a referendum adopted by the electors can be repealed only by a vote of the electorate in the same manner in which it was adopted. *Loboda v. Township of Clark,* 74 N.J. Super. 159, 180 A.2d 721 at 729 (Super.Ct. N.J. 1962).

Furthermore, in *Selle v. City of Henderson,* 309 Ky. 999, 218 S.W.2d 645 (1949), it was held that where an ordinance was repealed by referendum, a legislative body was prohibited from later enacting the subject matter of the ordinance.

A previous Kentucky case, *Ginsberg v. Kentucky Utilities Co.*, 260 Ky. 60, 83 S.W.2d 497 (1935) stated as follows:

> Where a petition for a referendum on an ordinance passed by the legislative body of a city was presented and the ordinance was repealed by a majority of persons voting on the question, the legislative body of the City thereafter may not pass the same ordinance or one identical with it in all essential features, and thereby thwart the will of the people as expressed at the polls . . .

Ginsberg does stand for the proposition that a legislature may change a statute or ordinance which was previously enacted by referendum, where there is a showing that the legislature, in its action, acted in good faith. Here, it is submitted that there is no showing of good faith which can be made to justify the judicial process modifying the referendum.

Petitioners submit that there can be no valid reason to explain why the City Council determined to pass legislation amending the section of the City Charter by local law, contrary to the voice of the electorate through direct referendum. Certainly, it cannot be said that exigent circumstances compelled the City Council to act. Likewise, it cannot be seriously argued that a second referendum on this issue is impractical. Clearly, the only rational inference that can be drawn from the action of the City Council was that the proponents of civilianization of the Review Board were fearful that the electorate would reject their proposal, and obtain the City Council action in order to obtain amendment of a section of the City Charter they never favored.

On one hand, the legal issues proposed to be presented to the Court on appeal involve this fairly narrow question of the use of the referendum within the body of law in the State of New York. Clearly, if this were the only issue involved in this case, the present petition should be summarily rejected by this Court. However, Petitioners submit that the diminution of due process rights to their membership by the Respondents in their misuse of the legislative enactment process contained in Section 42 of the New York City Charter is the major issue in this case, and one of such magnitude that it should be addressed.

The danger in permitting the decision at issue to stand would be to cause inroads to be driven into a basic body of law involving civil rights of certain categories of civil servants. This basic body of law is contained in such cases as *Gardner v. Broderick,* 392 U.S. 273 (1968) and *Garrity v. State of New Jersey,* 385 U.S. 493 (1967).

It is submitted that to permit the political process to intrude upon matters of police discipline—which would be a necessary by-product of having non-police members in the New York City Civilian Complaint Review Board—would so clearly impact upon the due Constitutional rights of Petitioners' membership, as to vitiate those rights, a circumstance which ought not be permitted. See *Owen v. City of Independence, Missouri,* 445 U.S. 622 (1980).

CONCLUSION

For the reasons stated above, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

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Appendix A—Order of Court of Appeals of the State of New York.

STATE OF NEW YORK

COURT OF APPEALS

Decision Court of Appeals Oct. 12, 1989

1 No. 196

IN THE MATTER

OF

PHIL CARUSO, as President of the Patrolmen's Benevolent Association of the City of New York, Inc., *et al.*,

Appellants,

v.

THE CITY OF NEW YORK, *et al.*,

Respondents.

Order affirmed, with costs, for the reasons stated in the opinion of Justice Arthur E. Blyn at Supreme Court (136 Misc 2d 892).

Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone, Hancock and Bellacosa concur.

APPENDIX B—Order of Affirmance of the Appellate Division, First Department.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 20, 1988

Present—Hon. David Ross,
Justice Presiding
John Carro
Sidney H. Asch
Bentley Kassal
George Bundy Smith,
Justices.

IN THE MATTER OF THE APPLICATION
OF

PHIL CARUSO, as President of the Patrolmen's Benevolent Association of the City of New York, Inc., and THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the CPLR

against

THE CITY OF NEW YORK, EDWARD I. KOCH, as Mayor of the City of New York, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, BENJAMIN WARD, as Police Commissioner of the City of New York, and THE CIVILIAN COMPLAINT REVIEW BOARD OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK,

Respondents-Respondents.

34760

An appeal having been taken to this Court by the petitioners-appellants from a judgment of the Supreme Court, New York County (Arthur Blyn, J.), entered on July 29, 1987,

And said appeal having been argued by Raymond E. Kerno of counsel for appellants, and by Alfred Weinstein of counsel for respondents; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same hereby is affirmed for the reasons stated by Arthur Blyn, J., without costs and without disbursements.

Enter:

HAROLD J. REYNOLDS
Clerk.

Appendix C—Judgment and Memorandum Decision of Supreme Court, State of New York.

Present:

Hon. Arthur E. Blyn, Justice.

IN THE MATTER OF THE APPLICATION

OF

PHIL CARUSO,

against

CITY OF NEW YORK, *ano.*, etc., *et al.*

Upon the foregoing papers this petition pursuant to CPLR Article 78 is denied and the proceeding is dismissed in accordance with the accompanying memorandum decision.

Arthur E. Blyn
J.S.C.

Dated July 9, 1987

FILED
Jul 29 1987
County Clerk's Office New York

County Clerk's No. 028141/1986

Memorandum Decision.

IN THE MATTER OF THE APPLICATION

OF

PHIL CARUSO, as President of the Patrolmen's Benevolent Association of The City of New York, Inc., and THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

against

THE CITY OF NEW YORK, EDWARD I. KOCH, as Mayor of the City of New York, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, BENJAMIN WARD, as Police Commissioner of the City of New York, and THE CIVILIAN COMPLAINT REVIEW BOARD OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK,

Respondents.

Index No.
28141/86

BLYN, J.

In this Article 778 proceeding, petitioners Phil Caruso, as president of the Patrolmen's Benevolent Association of

the City of New York ("PBA"), a public sector labor union, and the PBA seek a judgment declaring Local Law No. 13-A null and void.

Petitioners contend that Local Law No. 13-A, which is an amendment to section 440 of Chapter 18 of the Charter of the City of New York, was enacted by the New York City Council without authority, because it amends a Charter provision previously enacted by voter initiative in 1966.[1] Respondents cross-move to dismiss the petition on the ground it fails to state a cause of action.

In May 1966, the New York Police Commissioner established, by administrative order, an advisory review board consisting of four members appointed by the Mayor and three members appointed by the Police Commissioner, to review civilian complaints against police officers and to recommend whether formal charges should be preferred based on civilian complaints. On July 7, 1966, petitions were filed (on behalf of the PBA) with the City Clerk calling for submission of a proposed Charter amendment to the voters at the general election of November 1966. The PBA sought to limit membership on the review board to full-time employees of the Police Department. After litigation, the proposed Charter amendment

---

[1]Although petitioners refer to section 440 of the Charter as having been enacted by voter "referendum" in 1966, under Section 37 of the Municipal Home Rule Law, local laws amending Charter provisions are considered "initiated" by petition of qualified electors (see *Matter of Cassese v. Katz*, 26 AD 2d 248, affd 18 NY 2d 694). "Generally speaking, the initiative, in the case of municipal legislation, is initiation of municipal legislation and enactment or rejection thereof by the municipal electorate in the event the proposed measure is not enacted by their elected representatives. . . . Referendum [on the other hand] is the right of people to have an act passed by the legislative body submitted for their approval or rejection" (McQuillin, Municipal Corporations [3d ed], §§16.52, 16.53, pp 188-189).

appeared on the ballot in the general election of 1966 and was adopted by the voters.

This voter initiated measure became section 440 of Chapter 18 of the Charter, which provided that no person could be appointed to the Civilian Complaint Review Board ("CCRB") unless the person was, for a period of at least one year prior to the appointment, a regularly appointed full-time member or full-time administrative employee of the Police Department.

On November 6, 1986, the New York City Council passed Local Law No. 13-A, which amended section 440 of the City Charter, and eliminated the requirement that CCRB members be full-time Police Department employees. Local Law No. 13-A instead provides that the CCRB shall be comprised of twelve members, six of whom are civilians representing the five boroughs and the City-at-large. The Mayor of the City of New York signed the Council measure into law on November 24, 1986. Petitioners thereafter commenced this proceeding challenging Local Law No. 13-A as null and void. Respondents argue that the Council possesses the authority to amend section 440 of the Charter notwithstanding that it was enacted by voter initiative in 1966.

Municipalities in New York, in relation to matters which are local and municipal in character, have been granted "home-rule" under the Constitution of this State. By virtue of this grant, municipalities possess broad powers of legislation and administration of their affairs provided there exists no express or implied prohibition by the Constitution or the general law (NY Const, art IX, §§ 1[a], 2[b][1], 2[c][i]).

Section 10 of the Municipal Home Rule Law implements this constitutional grant by providing local governments the power to adopt and amend local laws not inconsistent with the State Constitution or any general law relating to their property, affairs or government. Section 42 of the New York City Charter allows that the Charter may be amended by the City Council, and in some instances, not applicable herein, by vote of the electors. Section 37 of the Municipal Home Rule Law provides that a city charter may be amended by voter initiative as an alternative to legislative enactment.

As petitioners concede, the Charter is silent on the question of whether the Council may amend or repeal a local law enacted by voter initiative. Petitioners, further acknowledge that there is no explicit statutory or constitutional limitation on the Council's general authority to amend the Charter by local law (see Municipal Home Rule Law, §37; N.Y. City Charter, §§27, 34, 42), for the reason that it was originally voter initiated. Rather, they argue that the Council implicitly lacks the power to amend section 440 of the Charter, previously enacted by the voters. To determine otherwise, petitioners contend, will result in an abuse of power by the Council and render meaningless the voters' right to enact Charter amendments, or at the least promote a confused series of enactments and re-enactments followed by voters' initiatives and voter approval.

As the parties correctly note, a sparsity of caselaw exists in New York relating to the issue of legislative amendment of voter initiated laws. Contrary to the urging of petitioners, *Halfmoon Bridge Co. v. Canal Board,* (91 Misc 600 [Supreme Ct. Saratoga County, 1915]) does not provide support for their argument that the Council implicitly is without authority to amend a section of the Charter enacted by the voters. *Halfmoon* involved an *explicit* pro-

vision in the State Constitution limiting the Legislature's power to amend voter-approved legislation relating to the contracting of work and the incurrence of debt for barge canal construction.

Other jurisdictions have addressed the issue of whether legislative bodies may amend or repeal measures previously enacted by voter initiative. Some state courts have dealt with the situation presented in *Halfmoon*, that is, an explicit prohibition or limitation on the respective legislative bodies' right to amend or repeal laws enacted by the voter initiative (see, e.g. *Warren v. Thomas*, 568 P 2d 400 [Alaska, 1977]).[2] Those courts which have reached the question of whether there is an implicit restraint on a legislative amendment or repeal of laws initiated by the voters, have split on the answer.[3]

---

[2]California, in its constitution, reserves considerable lawmaking power to the people (Cal. Const., art II, §§8[a], 19[a]). California courts have held the power of initiative there is conferred "without limitation", and "is, in the sense that it gives [the people] the final legislative word, a limitation upon the power of the Legislature" (*Carlson v Cory*, 139 Cal App 3d 724, 189 Cal Rptr 185, 187). Moreover, under section 4013 of the California Election Code, "an ordinance adopted by initiative may not be amended *or* repealed except by vote of the people, *absent a provision otherwise* in the initiative ordinance" (*C-Y Development Co. v Redlands*, 137 Cal App 3d 926, 932, 187 Cal Rptr 370, 374) (emphasis added).

[3](In favor of implied restraint, see e.g. *Town of Trumball v Ehrsom*, 148 Conn. 47, 166 A 2d 844 [Conn. 1966]; *Stetson v City of Seattle*, 74 Wash 606, 134 P 494, 495 [Wash. 1913]; against implied restraint, see e.g. *Bd. of Trustees of the Vil. of Rosemont v Mathias*, 109 Ill App 3d 894, 441 NE 2d 362 [Ill. 1982]; *Bird v Town of Old Orchard Beach*, 426 A 2d 370 [Me 1981]; *Mckann v Town of Irvington*, 133 NJL 63, 42 A2d 391 [N.J. 1945]; affd 45 A 2d 494; *Cornell v Watchung Mayor and Council*, 49 NJ 235, 229 A 2d 630 [1930] generally, Annotation, Power of Legislative Body to Amend, Repeal or Abrogate Initiative or Referendum Measure, or to Enact Measure Defeated on Referendum, 3 A.L.R. 1118 [1956]; see also, 42 Am Jur 2d, Initiative and Referendum, §58 [1969]; 1A Sutherland, Statutory Construction, [4th ed], ±23.23, p 23; 5 McQuillin, Municipal Corporations, [3d Ed.], §16.53, p 189).

The better answer appears to be that the laws proposed and enacted by the people under an initiative provision are subject to the same constitutional, statutory and charter limitations as those passed by the legislature and are entitled to no greater sanctity or dignity (see *Luker v Curtis,* 64 Idaho 703; 136 p 2d 978 [Idaho 703; 136 p 2d 978 [Idaho, 1943]). Inasmuch as a legislative body may modify or abolish its predecessor's acts subject only to its own discretion (see e.g. *Farrington v Pinckney,* 1 NY 2d 74, 82), it likewise should be able, in the absence of an express regulation or restriction, to amend or repeal an enactment by the electorate, its co-ordinate unit, and *vice versa.*

In the instant case, twenty years have elapsed between the time of the enactment by the voters and the subsequent amendment by the Council, during which period the voters' wishes presumably were being enforced as reflected in section 440 of the charter. To the extent that the Council passed a local law amending the Charter, and the Council represents the people, it may be considered that the *vox populi,* which secured the initiated legislation, changed its own voice.

Even assuming the Council immediately amended the Charter following the voter initiative, petitioners and other eligible voters would not be without remedies. They could re-enact the Charter provision, elect other Council members who more closely follow their views (See *Luker v Curtis,* 64 Idaho 703; 136 P 2d 978, 979 [Idaho, 1943]), or amend the Constitution, the Municipal Home Rule, or perhaps the Charter, to control or curb Council powers with respect to initiated legislation (see e.g. Wash. Const., 7th Amdt, art II §1).

Petitioners concede that as a general proposition, enactment by the electorate is the less preferred method, in New York, of passing laws. Under the Charter, for a local law to be passed by the Council it first must be introduced, printed and provided to Council members at least seven calendar days, (exclusive of Sundays), before its final passage.[4] Council members have the opportunity to debate, make amendments, discuss and analyze the proposed law. On the other hand, an initiative measure, seeking to amend the Charter, is proposed by a group of qualified electors, without opportunity for its amendment prior to passage, and generally, without opportunity for consideration by the electorate until its reproduction in local newspapers or its appearance on the ballot (see Municipal Home Rule Law, §37).

This Court, therefore, concludes that absent explicit indication to the contrary, the Council is vested with the power to amend section 440 of the Charter notwithstanding that it was voter initiated, which is consistent with the statutory mandate that the home rule provisions be liberally construed to effectuate their purposes (see Municipal Home Rule Law, §51).

Accordingly, the cross-motion is granted and the petition is dismissed for failure to state a cause of action.

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[4]In certain circumstances, however, when the Mayor certifies the necessity for doing so, the Council may act immediately to pass a bill (N.Y.C. Charter, §37).

This decision constitutes the judgment of the Court.

Dated: July 9, 1987

ARTHUR E. BLYN
J.S.C.

NORMAN GOODMAN
Clerk

FILED
Jul 29 1987
County Clerk's Office
New York

89-1005

Supreme Court, U.S.
FILED
JAN 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 1005

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

PHIL CARUSO, as President of the Patrolmen's Benevolent Association of the City of New York, Inc., and THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,
Petitioners,

-against-

THE CITY OF NEW YORK, EDWARD I.
(caption continued on next page)

MEMORANDUM OPPOSING CERTIORARI

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LEONARD J. KOERNER,
ALFRED WEINSTEIN,
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BEST AVAILABLE COPY

KOCH, as Mayor of the City of New York, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, BENJAMIN WARD, as Police Commissioner of the City of New York, and THE CIVILIAN COMPLAINT REVIEW BOARD of the Police Department of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK.

No. 1005

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

PHIL CARUSO, as President of the Patrolmen's Benevolent Association of the City of New York, Inc., and THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioners,

-against-

THE CITY OF NEW YORK, EDWARD I. KOCH, as Mayor of the City of New York, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, BENJAMIN WARD, as Police Commissioner of the City of New York, and THE CIVILIAN COMPLAINT REVIEW BOARD of the Police Department of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK.

MEMORANDUM OPPOSING CERTIORARI

Petitioners presented no constitutional issue to the New York courts. Had they done so, they could have appealed to the

New York Court of Appeals as of right. New York Civil Practice Law and Rules (CPLR) §5601(b)1. That Court granted leave to appeal on their motion. Caruso, Matter of, v. City of New York, 73 NY2d 707. Had the Court perceived a constitutional issue, it would have denied the motion on the ground that an appeal lied as of right. Ware v. Valley Stream High School District, 74 NY2d 829 (1989). The petition is silent on the subject. It should be denied. Rule 14.1(h), formerly 21.1(h).

Respectfully submitted,

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January 2, 1990